In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 621.

EDWARD D. HENDRICKSON, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 32-36) is reported at 200 F. 2d 137.

JURISDICTION

The judgment of the Court of Appeals was entered on November 24, 1952 (R. 37), and a petition for rehearing was denied on December 23, 1952 (R. 38). On January 19, 1953, Mr. Justice Minton extended the time for filing a petition for

a writ of certiorari to and including February 21, 1953, and the petition was filed on the latter date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

Whether falsifications of testimony suborned by petitioner related to material matters and thus constituted perjury in the trial of a civil case under the Illinois Dram Shop Act and in the later trial for perjury of a witness who testified falsely in the Dram Shop Act case.

STATUTES INVOLVED

18 U.S.C. 1621:

> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, * * *

18 U.S.C. 1622:

> Whoever procures another to commit any perjury is guilty of subornation of perjury, * * *

The so-called Illinois Dram Shop Act, approved January 31, 1934, L. 1933-34, Second Sp. Sess., p. 57, Art. VI; Ill. Rev. Stat., Chap. 43, Sec. 135:

> 14. Every husband, wife, child, parent, guardian, employer or other person, who shall be injured, in person or property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her own name, severally or jointly, against any person or persons who shall, by selling or giving alcoholic liquor, have caused the intoxication, in whole or in part, of such person; and any person owning, renting, leasing or permitting the occupation of any building or premises, and having knowledge that alcoholic liquors are to be sold therein, or who having leased the same for other purposes, shall knowingly permit therein the sale of any alcoholic liquors that have caused, in whole or in part, the intoxication of any person, shall be liable, severally or jointly, with the person or persons selling or giving alcoholic liquors aforesaid, * * * and the unlawful sale, or giving away, of alcoholic liquor, shall work a forfeiture of all rights of the lessee or tenant, under any lease or contract of rent upon the premises where such unlawful sale or giving away shall take place * * *.

STATEMENT

The petitioner seeks review of the judgment of the Court of Appeals for the Seventh Circuit (R. 37) affirming the judgment of the District Court for the Southern District of Illinois adjudging petitioner guilty, upon the verdict of a jury (R. 13), and imposing a general sentence of 30 months' imprisonment (R. 13) upon four counts for suborning the perjury of two witnesses, Brawley and Garner, in each of two prior trials in the same District Court (R. 1-3).

The first of the two trials took place on September 25, 1950, upon the complaint of the widow and children of one Maher, under the Illinois Dram Shop Act (*supra*, p. 3), against petitioner, Maurice I. Fuller, and Woodrow Wilson Morris, seeking to hold the three defendants liable for furnishing liquor which caused, "in whole or in part," the intoxication that brought about Maher's death in a fight with Morris (R. 4, 10).

According to the agreed statement on the appeal in the instant case (R. 1-7) the Government presented evidence which established the following facts: Maher, Morris, and Morris' wife, during the afternoon and evening of December 23, 1948, had "several drinks" at the Morris apartment, after which, during a stay of about 45 minutes at petitioner's tavern, they were served "several rounds of drinks" by Fuller, the bartender (R. 3-4). Upon leaving, Maher purchased two half-

pint bottles of whiskey from Fuller (R. 4). The three then went back to the Morris apartment. At the apartment, after drinking a part of one of the bottles of whiskey, Maher and Morris got into a fight and Maher was killed. (R. 4.)

At the trial of the Dram Shop Act case before the District Judge without a jury (R. 5), Mrs. Morris testified on behalf of the plaintiffs, stating the facts as to the furnishing of liquor at the tavern (R. 11, 21). Fuller, called as an adverse witness by the plaintiffs, and Brawley and Garner, witnesses for the defendants, perjured themselves by denying the serving and sale of the liquor at the tavern (R. 4-6). At the close of the evidence and arguments, the District Judge found that Maher and Morris were drunk at the time they entered the tavern (R. 5). He stated that "[i]f" he were to accept the testimony of Morris' wife, he would "still be in doubt" as to the actual effect upon Maher and Morris of the amount of liquor they drank at the tavern (R. 21-22); that "one glass of beer on top of" what Maher had had "probably made a little difference in Maher's condition" and that "perhaps the few swallows of whiskey he had at the house[afterward] made a little difference" (R. 22); that "a basic fact, is of course whether or not they obtained any liquor at this tavern"; that Garner's testimony that no liquor was sold to them was "rather convincing" and of "as much or more" weight than

that of Mrs. Morris; that in view of Fuller's prior testimony before the coroner's jury that he did sell them liquor his testimony should be thrown out, and "is out"; and that Brawley's testimony "supported" Garner's (R. 22). The District Judge then found for the defendants and held Fuller "to the grand jury for perjury" (R. 23).[1]

Fuller was tried for his perjury in the Dram Shop Act case on April 16, 1951. At this trial, Brawley and Garner again perjured themselves in denying the serving and sale of the liquor. Fuller was convicted. (R. 5.)

In May 1952 Brawley and Garner were convicted of perjury for their false testimony in the two trials (R. 5-6).

In January 1952 the present indictment against petitioner was returned, counts I and II charging the subornation of Brawley's perjury at the Dram Shop trial and the Fuller trial, respectively, and counts III and IV charging the subornation of Garner's similar perjury (R. 1-3). At the trial below Garner and Brawley admitted that they "perjured themselves upon the trials of the original Dram Shop case and the criminal case against Maurice I. Fuller, which perjury Garner and Brawley testified was committed at the behest of

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[1] On appeal from this judgment, the case was remanded for more specific findings and, if necessary upon reconsideration, modification. 188 F. 2d 700 (C.A. 7); R. 23-25. The ultimate outcome of the case does not appear in the record here (R. 25, 32-33).

and upon the procurement by the said Edward D. Hendrickson" (R. 6).

ARGUMENT

Petitioner contends here, as he did below, that Brawley and Garner's falsifications at the Dram Shop trial (counts I and III) could not have been material, and therefore not perjury, arguing that Maher's and Morris' intoxication before they went to petitioner's tavern foreclosed a recovery in that action (Pet. 15-18). With respect to Brawley's and Garner's similar falsifications (counts II and IV) at the trial of Fuller, the bartender, for his perjury in the Dram Shop case, petitioner apparently asks that Fuller's trial and conviction now be collaterally ruled a nullity on the ground that Fuller, like Brawley and Garner, only falsified as to an immaterial matter in stating that no liquor was furnished at the tavern.[2] Petitioner, then assuming this nullity as properly to be established and decreed here, apparently proceeds to yet a further assumption that it was thus immaterial what Brawley and Garner testified at Fuller's trial.

It is unnecessary to consider numerous aspects of the petition which in substance, and patently, involve an improper attempt to retry here the ultimate factual determinations of the Dram

[2] In the Court of Appeals, petitioner expressly contended that Fuller's conviction "was not a valid conviction" (R. 16).

Shop Act case and the Fuller perjury conviction. The petition is founded on two basic misconceptions, i.e., a misconception of what is material evidence in an Illinois Dram Shop Act trial and a misconception of the nature of the crime of perjury.

It is to be observed, first, that at the time the witnesses gave their false testimony in the Dram Shop case, there had not yet been a determination of the facts. It was clearly possible that the ultimate finding would be that the earlier intoxication, without the liquor furnished at the tavern, would not have lasted through the three-quarters of an hour at the tavern, the trip back to the apartment, and the time that elapsed there before the fatal fight. The single fact that Maher and Morris were intoxicated when they arrived at petitioner's tavern was clearly not dispositive of this factual question and was no defense *per se* under the Dram Shop Act. This is obvious from the language of the statute, i.e., "caused the intoxication, in whole or in part," and it has been repeatedly enunciated in the Illinois decisions that prior intoxication is not necessarily a defense. *Emory* v. *Addis*, 71 Ill. 273, 277; *Hackett* v. *Smelsley*, 77 Ill. 109, 117; *Roth* v. *Eppy*, 80 Ill. 283, 285; *Earp* v. *Lilly*, 217 Ill. 582, 586; *Mayers* v. *Smith*, 25 Ill. App. 67, 70, affirmed, 121 Ill. 442; *Brown* v. *Butler*, 66 Ill. App. 86, 89; *Coleman* v. *People*, 78 Ill. App. 210, 215-216; *Kelley* v. *Mal-*

hoit, 115 Ill. App. 23, 25. Accordingly, the false testimony that no liquor had been furnished was designed to meet the clear possibility that the judge might find that the final intoxication was not to be attributed solely to the earlier drinking, and that petitioner's defense would have to rest on convincing the trial judge that petitioner's bartender had furnished no liquor at all.

It is not entirely clear from the record whether Maher's widow was denied recovery by the trial judge because of a finding that no liquor was furnished at the tavern or upon a finding that liquor had been furnished but did not contribute, even "in part", to the final intoxication (see the trial judge's language, *supra,* pp. 5-6, and the Court of Appeals opinion in the Dram Shop case, R. 24-25). If the decision was upon the ground that no liquor was furnished, then the witnesses' falsification was obviously successful and petitioner's contention concerning immateriality of the testimony is clearly groundless. If, on the other hand, the decision was upon the ground that the liquor secured at the tavern, if any was furnished, could not have had even a partial effect, due to the extent of the earlier intoxication, perjury was nevertheless committed. For it is no defense to a perjury prosecution that because of some turn of the case the false testimony caused no miscarriage of justice, whether, for example, because of some later invalidation of the indict-

ment, as in *United States* v. *Williams,* 341 U.S. 58, or, as here, because of a later determination of fact making the false testimony possibly unnecessary or harmless. As stated by this Court in *United States* v. *Williams, supra,* at pp. 68-69):

> * * * The effect of the alleged false testimoney could not result in a miscarriage of justice in this case but the federal statute against perjury is not directed so much at its effects as at its perpetration; at the probable wrong done the administration of justice by false testimony. * * * Though the trial court or an appellate court may conclude that the statute is wholly unconstitutional, or *that the facts stated in the indictment* do not constitute a crime or *are not proven,* it has proceeded with jurisdiction and false testimony before it under oath is perjury. (Italics supplied.)

Moreover, the falsifications by Brawley, Garner, and Fuller had the effect, at the very least, of attacking the credibility of Morris' wife, who testified that liquor had been furnished at the tavern and whose testimony was important in other respects since she was one of the two remaining persons who had been present at the ultimate fatal fight. Perjury affecting the credibility of a witness clearly constitutes falsification of a material matter. *United States* v. *Weiler,* 143 F. 2d 204,

205-206 (C.A. 3), reversed on other grounds, 323 U.S. 606; *Goins* v. *United States,* 99 F. 2d 147, 148 (C.A. 4), certiorari granted, 306 U.S. 623, certiorari dismissed, 306 U.S. 622; *United States* v. *Slutzky,* 79 F. 2d 504, 505-506 (C.A. 3); *Luse* v. *United States,* 64 F. 2d 776, 777 (C.A. 9), certiorari denied, 290 U.S. 651.

CONCLUSION

The questions presented were correctly decided below and are, in addition, lacking in substance and so peculiar to the facts of this case as to deprive them of general importance. No conflict of decisions or constitutional question is involved. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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